80-867

Supreme Court, U. S.
FILED
NOV 28 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1980.

No.————

KIRK M. JACKSTADT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

FRANCIS H. NEVERETT
Counsel for Petitioner
39 Court St., P. O. Box 909
Plattsburgh, N. Y. 12901

Of Counsel
ARA ASADOURIAN
39 Court St., P. O. Box 909
Plattsburgh, N. Y. 12901
(518) 561-7711

Questions Presented.

1. Should the Decision of the Federal District Court granting Petitioner's motion to suppress for lack of probable cause have been reversed by the Circuit Court of Appeals where the government investigation recited in the affidavit established that the Petitioner had a minor prior conviction for marijuana possession and had purchased a chemical precursor to the manufacture of the illegal drugs under suspicious circumstances but did not trace the precursor into the Petitoner's residence nor establish that suspicious activity was observed in or about Petitioner's residence?

2. Was the Decision of the Court of Appeals reversing the District Court Decision in error because it improperly relied upon confidential informant information which does not meet the requirements of the first test as enunciated by the Supreme Court in *Aguilar v. Texas,* 378 U.S. 108, 114, 84 S. Ct. 1509, 1514 (1964), and *Spinelli v. United States,* 393 U.S. 410, 415, 416, 89 S. Ct. 584, 588, 589 (1969), to establish probable cause?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

KIRK M. JACKSTADT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner, Kirk M. Jackstadt, prays that a Writ of Certiorari issue to review the Judgement and Opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on October 30, 1980.

Opinions Below.

The Memorandum of Decision and Order of the United States District Court for the Northern District of New York dated June 15, 1979 granting Petitioner's motion to suppress the use of physical evidence seized in a search of Petitioner's residence in the prosecution of the Petitioner, which Decision has not yet been published, is appended hereto as Appendix "B." The Judgment and Opinion of the United States Court of

Appeals for the Second Circuit reversing the Decision of the District Court for the Northern District of New York, United States v. Jackstadt, 617 F.2d 12 (2d Cir. 1980) (per curiam), cert. denied, 100 S.Ct. 1656 (April 14, 1980), is appended hereto as Appendix "C." The Judgment of the Court of Appeals, confirming the Judgment of Conviction of the defendant of June 27, 1980 is appended hereto as Appendix "D".

Jurisdiction.

The Judgment of the Court of Appeals, appended hereto as Appendix "D," was entered on October 30, 1980.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1). A timely Petition for a Writ of Certiorari is hereby filed.

Questions Presented.

1. Should the Decision of the Federal District Court granting Petitioner's motion to suppress for lack of probable cause have been reversed by the Circuit Court of Appeals where the government investigation recited in the affidavit established that the Petitioner had a minor prior conviction for marijuana possession and had purchased a chemical precursor to the manufacture of the illegal drugs under suspicious circumstances but did not trace the precursor into the Petitoner's residence nor establish that suspicious activity was observed in or about Petitioner's residence?

2. Was the Decision of the Court of Appeals reversing the District Court Decision in error because it improperly relied upon confidential informant information which does not meet the requirements of the first test as enunciated by the Supreme Court in *Aguilar v. Texas,* 378 U.S. 108, 114, 84 S. Ct. 1509, 1514 (1964), and *Spinelli v. United States,* 393 U.S. 410, 415, 416, 89 S. Ct. 584, 588, 589 (1969), to establish probable cause?

Constitutional Provisions Involved.

The constitutional provision involved is the Fourth Amendment prohibiting the issuance of a search warrant except upon probable cause.

On January 18, 1979, a search warrant was issued by United States Magistrate for the Northern District of New York, Henry Van Acker, for the search of the residence of Petitioner and one, Joseph A. Tourville, in AuSable Acres, New York. The search warrant and affidavit are appended hereto as Appendix "A." A search was conducted pursuant to the warrant on the evening of January 18, 1979.

On February 20, 1979, a Grand Jury sitting in the United States District Court for the Northern District of New York indicted the Petitioner and Joseph A. Tourville for conspiracy to manufacture hashish oil and possess the drugs with intent to distribute (Count I), possession of hashish oil with intent to distribute (Count II) and possession of marijuana with intent to distribute (Count III).

On April 2, 1979, the Petitioner and Joseph A. Tourville, by separate motions, moved in the District Court for the Northern District of New York to suppress the use in their prosecution of the physical evidence seized in the search on January 18, 1979. By Memorandum-Decision and Order dated June 15, 1979, Chief Judge James T. Foley granted the separate motions to suppress and ordered that the property seized in the search not be offered in evidence (Appendix "B"). The United States of America appealed the Decision of the District Court to the United States Court of Appeals for the Second Circuit. By Judgment and Opinion decided on February 14, 1980, the United States Court of Appeals for the Second Circuit reversed the Decision of the District Court (Appendix "C"). Petitioner now prays for a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Second Circuit. Petitioner herein thereafter petitioned the Supreme Court for a Writ of Certiorari to the Court of Appeals. Petition bearing Docket Number 79-1413 was denied. On June 27, 1980 Petitioner was convicted of a violation of Title 21 United States Code Section 841 (a) (1) upon a plea of guilty with a reservation by Petitioner of the right to appeal the issue of probable cause for the issuance of the search warrant. By Judgment entered on October 30, 1980 the Court of Appeals affirmed Petitioner's conviction of June 27, 1980. Petitoner now prays for a Writ of Certiorari to review the Judgment of Affirmance of the Court of Appeals.

Argument.

Certiorari should be granted in this case because the Decision of the Court of Appeals for the Second Circuit, reversing the Decision of the District Court, is in conflict with the standards of probable cause established in the Decisions of the United States Court of Appeals for the Fifth, Sixth and Seventh Circuits in the cases of *United States v. Park,* 531 F. 2d 754 (5th Cir. 1976); *United States v. Moore,* 452 F. 2d 569 (6th Cir. 1971), and *United States v. Noreikis,* 481 F.2d 1177 (7th Cir. 1973). Certiorari should also be granted in this case because in its Decision, the Court of Appeals, although disavowing any reliance, did rely upon confidential informant information which does not properly qualify under the first test enunciated by this Court in its Decision in *Aguilar v. Texas,* 378 U. S. 108, 114, 84 S. Ct. 1509, 1514 (1964), and *Spinelli v. United States,* 393 U. S. 410, 415, 416, 89 S. Ct. 584, 588, 589 (1969).

The affidavit in support of the application for search warrant in this case contains both confidential-informant information and non-informant information obtained through government surveillance and investigation. The affidavit purports to establish probable cause that Petitioner and his co-defendant had concealed in their residence an illicit laboratory manufacturing hashish oil. The confidential informant information relates primarily to a prior government investigation of other individuals which is included in the affidavit to create the impression of a continuing government investigation. The non-informant information purports to show that petitioner, who had previously been convicted of a minor marijuana violation under state law, was observed purchasing liquid ether, a chemical which can be used in the manufacture of hashish oil, under an assumed name, and transporting the ether to his home.

Both the District Court and the Court of Appeals, although for different reasons, claim to disregard the informant information in the affidavit. The District Court held that the confidential informant information in the affidavit relevant to Petitioner

and his co-defendant could not be considered in determining probable cause as it failed to meet the first test of *Aguilar-Spinelli.* The Court of Appeals simply disavows any need to rely on the informant information.

On the issue of the sufficiency of the non-informant information the District Court and the Court of Appeals disagree. The District Court held that the information obtained by government investigation and surveillance, standing alone, did not demonstrate probable cause for the issuance of the search warrant. The Court of Appeals, in reversing, found that "without reference to the informant's tip . . . that the officer's investigation and observation provided substantial basis" for the issuance of the warrant (Appendix "C").

I.

The decision of the Court of Appeals is in conflict with decisions of the Fifth, Sixth and Seventh Circuits.

The Courts of Appeal of the Fifth, Sixth and Seventh Circuits have approved the issuance of search warrants, where government investigators, tracing chemical precursors purchased under suspicious circumstances, have established all of the following:

(1) That a chemical precursor to the manufacture of illegal drugs was purchased under suspicious circumstances; and

(2) That the precursor was traced by investigation to the premises sought to be charged; and

(3) That suspicious activity, such as odor, were observed in or about the premises to which the precursor was traced. *United States v. Park, supra; United States v. Moore, supra;* and *United States v. Noreikis, supra.*

In expressed reliance upon the standards of probable cause formulated in these cases, the District Court, while allowing that the affidavit established that Petitioner had been previously convicted of possession of marijuana as a violation under state law and was observed purchasing the precursor, liquid ether, under an assumed name and transporting the ether in his automobile to the driveway of his home, nevertheless, granted Petitioner's motion to suppress because the affidavit (a) failed to establish that the precursor had been traced into Petitioner's residence and (b) failed to establish that any suspicious activity was observed in or about Petitioner's residence as required by *United States v. Park, supra; United States v. Moore, supra,* and *United States v. Noreikis, supra.*

In reversing the Decision of the District Court, the Court of Appeals completely ignored the finding of the District Court that the affidavit was defective because it did not reveal any observation of suspicious activity in or about Petitioner's home. The Decision of the Court of Appeals, eliminating the need for the affidavit to show that suspicious activity was observed in or about Petitioner's residence, is a far reaching, troubling and unconstitutional departure from previously established standards of probable cause as set forth in *United States v. Park, supra; United States v. Moore, supra,* and *United States v. Noreikis, supra.* In each of these cases, it was the observed suspicious activity in or about the premises sought to be searched which established the probability that the suspicions aroused by the purchase of the precursor were related to criminal activity or evidence of it in the premises. The affidavit in this case, while adequately documenting suspicious activity by the Petitioner and maybe even his co-defendant away from his home, is devoid of any information whatsoever tending to establish that the Petitioner or anyone else was operating an illicit manufacturing laboratory at Petitioner's home. Petitioner's previous conviction of possession of marijuana, while further arousing the suspicions raised by the circumstances of Petitioner's purchase of the ether, does not cure the inadequacy of the affidavit in failing to relate Petitioner's suspicious behavior to his home. *United States v. Karanthanos,* 531 F. 2d 26, 30 (2d Cir. 1966).

cert. denied 428 U. S. 910 (1976). Certainly, the mere fact that Petitioner's jeep and his co-defendant's auto were observed parked in their own driveway did not establish the probability that the ether they purchased was to be used in an illegal laboratory located in the home. By eliminating the requirement that the affidavit shows suspicious activity in the premises sought to be searched, the Court of Appeals frankly sanctions the unconstitutional proposition that search warrants may be issued for the home or a person with a prior criminal record based only on observations of suspicious activity by that person away from his home.

Contrary to the standard of probable cause established in the Fifth, Sixth and Seventh Circuits and relied on by the District Court, the Court of Appeals concluded that simply tracing the ether to Petitioner's home was a sufficient substitute for observation of suspicious behavior in or about the home. Without this finding there would be no basis whatsoever to conclude that the ether would even be located in Petitioner's home. Even diluting the standard of probable cause to that extent, the Court of Appeals still faced great difficulty with this affidavit because the affidavit by its own words does not trace the ether into the home. The Court of Appeals resolved this dilemma by inferring from the facts presented in the affidavit that at least some of the chemical precursor had been taken into his home by Petitioner.

The affidavit does clearly establish that the Petitioner purchased liquid ether under an assumed name and transported the ether to the driveway of his home in his jeep. The only other reference in the affidavit to the ether in Petitioner's jeep is as follows:

> "At approximately 7:20 P.M. Investigator Fountain observed Jackstadt removing a five-gallon can from the rear of his jeep, bearing New York registration 105CJE" (Appendix "A").

The District Court rejected the argument that this statement in the affidavit traced the precursor into Petitioner's home in concluding that "the statement of surveillance stopped after removal of the five-gallon can from the jeep and never follows it or traces it into the residence" (Appendix "A"). The Court of Appeals circumvented this critical gap in the affidavit by deciding it was permissible for the Magistrate to infer that after Petitioner removed a can of the ether from his jeep that he then carried it into his home. As authority for drawing this inference the Court of Appeals cites *United States v. Pond,* 523 F. 2d 210, 213 (2d Cir. 1975), cert. denied 423 U. S. 1058 (1976); *United States v. Serao,* 367 F. 2d 347, 349-50 (2d Cir. 1966), vacated on other grounds *sub nom. Piccioli v. United States,* 390 U. S. 202 (1968). However, none of these cases sanction the drawing of an inference of the type made by the Court of Appeals. Each of these cases involve the drawing of an inference from an observed fact which is recited in the affidavit. In each of these cases no necessary observation of fact is inferred, only the meaning of an observed fact is inferred. Here, on the other hand, the Court of Appeals simply infers that something took place which is not recited in the affidavit to have taken place. The consequences of this error is decisive since the entire Decision of the Court of Appeals necessarily rests on this improper inference of essential fact. Without the inference that Petitioner carried some ether into his home there is nothing in the affidavit tending to show that Petitioner was probably going to use the ether in an illicit manufacturing laboratory at his home.

In its Decision, the Court of Appeals derides the notation that an inference other than the inference that Petitioner carried the ether into his home is appropriate. This ridicule only disguises the weakness of the argument. Is it not more logical to infer that the Petitioner did not take the ether into his house because the person observing him did not say that he did? In fact, the affidavit simply does not say what Petitioner did with the ether. The danger of abuse inherent in reliance on an inference of this nature is far reaching and self-evident. When it is no longer necessary to observe or otherwise document facts necessary to find probable cause where will this process of inference end?

The absence of a necessary fact is the very essence of the difference between suspicion and probable cause and therefore the difference between a legal search and an illegal search.

The District Court, in granting Petitioner's motion to suppress the established constitutional standards of probable cause, gave weight to the facts relied on by the government and the Court of Appeals and concluded that this affidavit did not establish probable cause for the issuance of this warrant. Since the Court of Appeals has repudiated these standards, it is respectfully requested that this Court, in the proper exercise of its powers, grant certiorari to review the Decision of the Court of Appeals.

II.

The Court of Appeals improperly relied on confidential informant information.

The affidavit in this case established through government investigation that Petitioner had been convicted some eight months prior to the application to search his home for possession of marijuana as a violation under state law. The District Court, citing, *United States v. Lewis,* 392 F. 2d 377, 379 (2d Cir. 1968), cert. denied 393 U. S. 891, 89 S. Ct. 212 (1968), acknowledged that the prior conviction was an important factor tending to show probable cause. The District Court concluded, however, that this conviction, together with the other non-informant information in the affidavit did not demonstrate probable cause to support the search warrant.

In reversing, the Court of Appeals placed crucial reliance on Petitioner's prior conviction in finding probable cause. The Court of Appeals did this by unconstitutionally relying upon the informant information in the affidavit so as to read the affidavit to reveal not only the prior conviction but more ominously that Petitioner "had previously been arrested under circumstances that linked him with the manufacture of hashish oil" (Appendix "C"). Certainly the difference in probability that the ether

would be used in an illegal manner when purchased by a person who was convicted of a relatively minor charge of marijuana possession as opposed to an "arrest linking him to the manufacture of hashish oil" are self-evident in an application to search for a hashish oil factory.

The non-informant information in the affidavit does not link Petitioner's prior arrest to the manufacture of hashish oil. The only linkage of this nature is made in the confidential informant information in the affidavit. While the affidavit recites at great length the circumstances of a prior investigation by the affiant of a hashish oil manufacturing operation being conducted by a Charles Miller and William Reid which eventually led to their arrest, the non-informant information in the affidavit does not link Petitioner to that investigation. All the non-informant information in the affidavit says about the circumstances of Petitioner's prior arrest is the following affirmance:

> "On May 6, 1978 I was participating in a joint investigation with the New York State Police and the Plattsburgh Police Department. As a result of this investigation, Edward Joseph DESAUTELS, DOB: September 17, 1951, Lot 73, Garden City Trailer Park, Plattsburgh, New York; Kirk Mathew JACKSTADT, DOB: September 13, 1949, 26 Leonard Avenue, Plattsburgh, New York and Cathy Julia KIPP, DOB: July 3, 1955, Tom Miller Road, Plattsburgh, New York, were arrested at Edward DESAUTELS' trailer. At this time several pounds of marijuana, a quantity of hashish and two glass jars containing less than 25 grams of hashish oil were seized" (Appendix "A").

This statement of the investigation leading to Petitioner's prior conviction certainly does not indicate that the investigation of the Petitioner was a part of the investigation of Miller and Reid's manufacturing operation recited elsewhere in the affidavit.

The only statements in the affidavit which purport to link the Petitioner to the Miller and Reid investigation are two unsupported conclusions of an informant; namely, that one Desautels "was one of Charles Miller's runners" and "that Jackstadt was one of Edward Desautels runners" (Appendix "A").

Although the Court of Appeals expressly disavows any reliance on the informant information in finding probable cause, in fact, the reading of the affidavit by the Court of Appeals which turns Petitioner's seemingly minor conviction of marijuana possession into an arrest that "linked him to the manufacture of hashish oil" necessarily rests on the informant information which the District Court held did not "comply with the standards of the noted *Aguilar-Spinnelli* tests" (Appendix "D"). Petitioner, therefore, requests this Court, in exercise of its powers, to grant certiorari to review the Decision of the Court of Appeals.

CONCLUSION.

The decision in this case dilutes and is in conflict with standards of probable cause established by the Fifth, Sixth and Seventh Circuits and the decisions of the United States Supreme Court and presents an opportunity for this Court to resolve the conflict. It will not become moot. For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

FRANCIS H. NEVERETT,
Counsel for Petitioner,
39 Court Street, P. O. Box 909,
Plattsburgh, N. Y. 12901

Of Counsel,
ARA ASADOURIAN,
39 Court Street, P. O. Box 909,
Plattsburgh, N. Y. 12901

APPENDIX – Search Warrant.

APPENDIX A.

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	)	Magistrate's Docket No.
VS.	)	Case No. C8-79-0007
Joseph A. TOURVILLE et al	)	SEARCH WARRANT

To any United States Marshal or other authorized officer

Affidavit having been made before me by Special Agent Thomas M. Fitzpatrick that he (has reason to believe) that (on the premises known as) the residence of Joseph A. TOURVILLE and Kirk JACKSTADT, an "A" frame structure located by proceeding in a westerly direction on Church Street in the village of Ausable Forks, then turning left on Ausable Drive, proceeding on Ausable Drive until reaching the first Oak Hollow Rd. proceeding on the Oak Hollow Road until intersecting with Butternut Street.At Butternut St. turn right and travel approximately .2 of a mile on Butternut St. whereby the residence is on the left side of the road and is the second structure on the left on Butternut Street.

in the Northern District of New York there is now being concealed certain property, namely an illicit laboratory manufacturing hashish oil, a controlled substance under the Schedule I (here describe property) of the Controlled Substance Act of 1970

which are contraband, controlled substances illegally manufactured and possession in violation of 21 USC841(a)(1) and 21 USC846 of the Controlled Substance Act of 1970 (here give alleged grounds for search and seizure)

and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the (premises) above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the (place) named for the property specified, serving this warrant and making the search (at any time in the day or night[1]) and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 18th day of January, 1979

s/ HENRY VAN ACKER.
U.S. Magistrate.

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[1] The Federal Rules of Criminal Procedure provide: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C)

APPENDIX — Search Warrant.

RETURN

I received the attached search warrant on January 18, 1979, and have executed it as follows:

On January 18, 1979 at 8:10 o'clock P.M, I searched (the premises) described in the warrant and

I left a copy of the warrant with Kirk M. JACKSTADT
name of person searched or owner or "at the place of search"
together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant: See attached list consisting of three pages.

This inventory was made in the presence of Thomas M. Fitzpatrick, Special Agent; John Fountain, New York State Police and Fenton Thompson.

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

s/ THOMAS M. FITZPATRICK
Thomas M. Fitzpatrick, Special Agent

Subscribed and sworn to and returned before me this 19th day of January, 1979.

s/ HENRY VAN ACKER
Henry C. Van Acker *U.S. Magistrate.*

APPENDIX – Affidavit for Search Warrant.

UNITED STATES DISTRICT COURT
FOR THE
Northern District of New York

UNITED STATES OF AMERICA	)	Magistrate's Docket No.
VS.	)	Case No. C8-79-0007
Joseph A. TOURVILLE et al	)	AFFIDAVIT FOR SEARCH WARRANT

BEFORE Henry C. Van Acker (Name of Magistrare,) Rouses Point, New York (Address of Magistrate)

The undersigned being duly sworn deposes and says:

That he (has reason to believe) that (on the premises known as) the residence of Joseph A. TOURVILLE and Kirk JACKSTADT, an "A" frame structure located by proceeding in a westerly direction on Church Street in the village of Ausable Forks, then proceeding left on Ausable Drive proceeding on Ausable Drive until reaching the first Oak Hollow Road, proceeding on the Oak Hollow Road until intersecting with Butternut Street.At Butternut St. turn right and travel approximately .2 of a mile on Butternut St. whereby the residence is on the left side of the road and is the second structure on the left on Butternut Street.

in the Northern District of New York there is now being concealed certain property, namely an illicit laboratory manufacturing hashish oil, a controlled substance under Schedule I of the Controlled Substance Act of 1970 (here describe property)

which are contraband, controlled substances illegally manufactured and possessed in violation of 21 USC841(a)(1) and 21 USC846 of the Controlled Substance Act of 1970. (here give alleged grounds for search and seizure)

APPENDIX — Affidavit for Search Warrant.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

During the month of April, 1978 I received information from Investigator John W. Fountain, New York State Police, Malone, New York, that a hashish oil factory was operating in the Plattsburgh, New York area. Investigator Fountain advised me that a previous reliable informant had informed him that the hashish oil factory was being operated by Charles MILLER and William REID, both residing at 75 Clinton Street, Plattsburgh, New York. Investigator Fountain further advised that his informant stated that Edward DESAUTELS, Garden City Trailer Court, Plattsburgh, New York, was one of Charles MILLER's drug runners.

During the month of June, 1978 Investigator Fountain advised that his previously reliable informant had furnished him with a sample of hashish oil that Charles MILLER and William REID were manufacturing. Investigator Fountain further advised that he had conducted a field test on the hashish oil for the presence of marijuana with positive results.

On May 6, 1978 I was participating in a joint investigation with the New York State Police and the Plattsburgh Police Department. As a result of this investigation, Edward Joseph DESAUTELS, DOB: September 17, 1951, Lot 73, Garden City Trailer Park, Plattsburgh, New York; Kirk Mathew JACKSTADT, DOB: September 13, 1949, 26 Leonard Avenue, Plattsburgh, New York and Cathy Julia KIPP, DOB: July 3, 1955, Tom Miller Road, Plattsburgh, New York, were arrested at Edward DESAUTELS' trailer. At this time several pounds of marijuana, a quantity of hashish and two glass jars

(cont'd.)

containing less than 25 grams of hashish oil were seized. Investigator Fountain advised me that the hashish oil appeared to be of the same description that he had received from Charles MILLER through his reliable informant.(This information was received from JWF during June, 1978.)

DESAUTELS, JACKSTADT, and KIPP were arrested on Felony Drug Charges. On January 18, 1979 Investigator Fountain advised me that the charges against DESAUTELS are still pending. Further, that Kirk JACKSTADT and Cathy KIPP pled guilty to a reduced charge of Possession of Marijuana Violation and were fined $25.00 each on May 8, 1978.

On May 7, 1978 Investigator Fountain advised me that he had received information from his reliable informant that Kirk JACKSTADT was one of Edward DESAUTELS runners.

On October 24, 1978 I participated in a joint investigation with the New York State Police and the Plattsburgh Police Department. On this date a search warrant was executed at the residence of Charles Joseph MILLER, DOB: February 8, 1950, and William Henry REID, III, DOB: August 28, 1950, both of 75 Clinton Street, Plattsburgh, New York. At this time approximately one pound of marijuana, approximately 44.7 grams of hashish oil, a quantity of glass work and other equipment used in the manufacturing of hashish oil. Also seized was an empty five-gallon can of petroleum ether. This can had a label on it and Investigator Fountain requested that I trace the can to the distributor. The label on the can bore the name Farrell Chemical, Winooski, Vermont.

On January 18, 1979 Investigator Fountain advised me that MILLER and REID had pled guilty to a reduced charge of

(cont'd.)

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Affidavit for Search Warrant
January 18, 1979

Criminal Possession of Marijuana in the Second Degree, a Misdemeanor, and paid a $500 fine each on October 24, 1978.

On December 8, 1978 I received information from Investigator Fountain that he had received information from his reliable informant that Charles MILLER and his associates were manufacturing hashish again. Further, that the hashish oil factory was supposed to be secreted at a secluded rural location. Investigator Fountain further advised that several other reliable informants had advised him that a large hashish oil factory was operating in the Peru-Saranac, New York area.

On December 12, 1978 I interviewed Buddy Folino of Farrell Chemical Company, Winooski, Vermont, regarding anyone from the Plattsburgh, New York area purchasing quantities of petroleum ether. Folino stated that around 11:00 a.m., December 12, 1978, he had received a call from Richard MILLER ordering 20 gallons of petroleum ether.

On December 12, 1978, around 4:00 p.m., information was received from Buddy Folino, Farrell Chamical Company, that 19 gallons of petroleum ether was picked up by a subject using the name "Rick" MILLER. Folino described "Rick" MILLER as 5'9", brown hair, 170 pounds and driving a green Dodge, bearing New York Registration 631CJE.

On December 12, 1978 I obtained a data on New York Plate 631CJE and found it was registered to Joseph A. TOURVILLE, DOB: February 12, 1949, of Signal Hill, Lake Placid, New York. A driver's data revealed an address of 33 Olivetti Place, Plattsburgh, New York.

(cont'd.)

APPENDIX — Affidavit for Search Warrant.

Page 5
Affidavit for Search Warrant
January 18, 1979

On December 15, 1978 Investigator Fountain advised me that his department had intelligence information that Joseph TOURVILLE, Plattsburgh, New York, was involved in illegal drugs. (Marijuana)

On December 28, 1978 I caused a lookout to be placed at Anachemia Chemical Company, Inc., Champlain, New York, for anyone purchasing large amounts of petroleum ether.

On January 16, 1979 I received a call from Al Saunders, manager of Anachemia Chemical Company, Champlain, New York, stating that a subject using the name Rick MILLER, Peru, New York, had called and requested to purchase 20 gallons of petroleum ether. Saunders stated he told MILLER he didn't have 20 gallons in stock, but that he could have it for him on January 17, 1979, and to call in the afternoon sometime after 3:00 p.m.

On January 17, 1979, at approximately 3:35 p.m., Al Saunders advised that at approximately 3:20 p.m. a call was received from the subject using the name Rick MILLER. MILLER wanted to know if his order was in. Mr. Saunders' secretary stated she told MILLER it was in and MILLER told her he would pick it up before 4:30 p.m.

On January 17, 1979, at approximately 3:45 p.m., a surveillance was commenced in the vicinity of Anachemia Chemical Company, Inc. by Investigator John Fountain, New York State Police, Malone, New York; Richar Siegel, United States Customs and Michael Consavage, United States Customs, Rouses Point, New York. I took up a position in the office of the chemical company.

(cont'd.)

Page 6
Affidavit for Search Warrant
January 18, 1979

At approximately 4:25 p.m., a subject who I identified as Kirk JACKSTADT arrived at the office. Kirk JACKSTADT picked up the 20 gallons of petroleum ether, paid $106.40 in cash and signed the receipt R. MILLER. JACKSTADT placed the petroleum ether in the rear end of a green Jeep, with wooden doors and cab, bearing New York registration 105CJE and left.

Surveillance was maintained on JACKSTADT's vehicle and eventually he drove to a large "A" frame residence on Butternut Street, located at AuSable Acres, AuSable Forks, New York. JACKSTADT arrived there at approximately 7:00 p.m.

At approximately 7:20 p.m., Investigator Fountain observed JACKSTADT removing a five-gallon can from the rear of his Jeep, bearing New York registration 105CJE.

On January 17, 1979 a data was obatined on New York Plate 105CJE and it was registered to Kirk M. JACKSTADT, DOB: September 13, 1949, of Signal Hill, Lake Placid, New York.

On January 17, 1979 at approximately 8:00 p.m., a green Dodge, 4-door Sedan, bearing New York registration 631CJE was observed in the driveway of the residence, where Kirk JACKSTADT had parked his vehicle. This being the same vehicle used by another subject using the name "Rick" MILLER to pick up 20 gallons of petroleum ether on December 12, 1978 from the Farrell Chemical Company in Winooski, Vermont.

On January 18, 1979 this agent discussed the case with D.E.A.Chemist Richard Karasiewsky at the Northeastern Regional Laboratory and he advised that petroleum ether is used to extract hashish oil from marijuana.

(cont'd.)

APPENDIX — Affidavit for Search Warrant.

Page 7
Affidavit for Search Warrant
January 18, 1979

A Night-Day Search Warrant should issue hereon due to the moveable nature of the petroleum ether, laboratory equipment and marijuana.

_____

Signature of Agent,

Resident Agent-in-Charge

Official Title, if any.

Sworn to before me, and subscribed in my presence, January 18, 1979.

_____

United States Magistrate.

APPENDIX B.

APPENDIX — Memorandum-Decision and Order.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs. 79—CR—20

KIRK M. JACKSTADT and
JOSEPH A. TOURVILLE,
Defendants.

APPEARANCES: OF COUNSEL:

GEORGE H. LOWE — TERRENCE M. KELLY
United States Attorney, N.D.N.Y. — Assistant U.S. Attorney
Attorney for United States of America
U.S. Post Office & Courthouse
Albany, New York 12207

NEVERETT & ASADOURIAN — ARA ASADOURIAN
Attorneys for defendant Jackstadt
39 Court Street, P.O. Box 909
Plattsburgh, New York 12901

PAUL V. FRENCH
Attorney for defendant Tourville
112 State Street, Suite 1100
Albany, New York 12207

JAMES T. FOLEY, D.J.

MEMORANDUM-DECISION and ORDER

There are separate motions presented for the above two defendants to suppress evidence obtained by reason of the execution of a search warrant at an "A" frame house located on Butternut Street, Town of Jay, New York. The date of the execution of the search warrant was January 18, 1979, and it had been issued by Magistrate Henry C. Van Acker, Jr. of this District Court on January 18, 1979. The two defendants have been indicted jointly in three counts: One of conspiring to manufacture a quantity of hashish oil (an extract of marihuana), and with intent to distribute marihuana and

hashish oil; and two substantive counts of possession with intent to distribute approximately 30 pounds of hashish oil, and in the third count approximately 40 pounds of marihuana. Trial upon the indictment is scheduled to commence in the immediate future.

The motions have been submitted in good form and briefed factually and legally, competently and thoroughly. The challenge in both motions is that the affidavit of Thomas M. Fitzpatrick, Special Agent, Drug Enforcement Administration, sworn to January 18, 1979, and duly submitted to the Magistrate to support the issuance of the search warrant was deficient in failing to supply the necessary element of probable cause. The affidavit is single space typing on three pages, filled with great detail of names and information gleaned and passed back and forth in a joint state and city police, and federal drug agent investigation, moving from place to distant place over a period from April 1978 to January 18, 1979, the day of the raid on the house. It was not done on the affidavit submitted to the Magistrate, but to the credit of the lawyers to accomplish easier reading and understanding, the numerous paragraphs of the affidavit have been numbered 2 to 24, or lettered A to W, and keyed accordingly into the particular brief where reference is made to the paragraphs. Attorneys for both sides express full confidence in their respective positions.

The case law on questions of this kind when they possess substance is substantial and the lines drawn and distinctions made are fine. It is settled that in a situation as this one consideration may be given only to the facts within the four corners of the affidavit. *Aguilar* v. *Texas*, 378 U.S. 108, 109 (1964). In *Spinelli* v. *United States*, 393 U.S. 410, 419, Justice Harlan summarized the principles and standards to be followed and applied in the analysis of the facts in such affidavits:

> In holding as we have done, we do not retreat from the established propositions that only the probability, and not a prima facie showing, of criminal activity is the standard

> of probable cause, *Beck* v. *Ohio*, 379 U.S. 89, 96 (1964); that affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial, *McCray* v. *Illinois*, 386 U.S. 300, 311 (1967); that in judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense, *United States* v. *Ventresca*, 380 U.S. 102, 108 (1965); and that their determination of probable cause should be paid great deference by reviewing courts *Jones* v. *United States*, 362 U.S. 257, 270-271 (1960).

These principles as stated from the review of previous Supreme Court decisions, unquestionably in favor of upholding the search warrants have been kept in mind, but even with their application to the fullest extent my conviction is firm that the affidavit falls short of required factual showing.

First, I find that there is not sufficient information supplied or circumstances related about the informants as described by the State Police Investigator to Special Agent Fitzpatrick to comply with the standards of the noted *Aguilar-Spinelli* tests. *See* for restatement, *United States* v. *Karathanos*, 531 F.2d 26, 31 (2d Cir. 1976), *cert. den.*, 428 U.S. 910. An example of the weakness is the statement without further elaboration that "Investigator Fountain advised me that he had received information from his reliable informant that Kirk JACKSTADT was one of Edward DESAUTELS runners." (Par. 6 or E). Again, with some lack of preciseness, information from the same unnamed, reliable informant of Inspector Fountain . . . "that the hashish oil factory was supposed to be secreted at a secluded rural location." (Par. H or 9). That description would cover many areas of Upstate New York and would hardly lead to the probability that had to be presented that an illicit manufacturing operation was being conducted on Butternut Street in the Village of Ausable Forks. There are other deficiencies in the recitation of the informant tips, but it does seem from the facts selected by the government in its brief that there is not great reliance placed upon the informant information as

supplying probable cause, but the facts pointed to are ones relating to actual surveillance of Jackstadt, the driveway, and outer area of the residence.

However, my review of the facts in that regard, actual surveillance information, does not persuade me that the facts gained therefrom and recited in the affidavit satisfactorily demonstrate probable cause to support the search warrant. The most that is shown in paragraphs 19, 20 and 22 are that the Jackstadt Jeep and the Tourville car were seen at the premises, and that a five-gallon can was removed from the Jeep at 7:30 P.M., January 18, 1979. I view it also as an important omission, that in the search for probable cause to uphold the execution of the search warrant against the premises, that the statement of surveillance stops after removal of the five-gallon can from the Jeep and never follows or traces it into the residence.

The case law offered by the government as to certain parts of the factual statements in the affidavit has not been disregarded or overlooked. Purchase of a chemical precursor under a fictitious name is an important factor to consider. *United States* v. *Noreikis*, 481 F.2d 1177, 1178 (7th Cir. 1973); *United States* v. *Moore*, 452 F.2d 569, 572 (6th Cir. 1971), *cert. den.* 407 U.S. 910 (1972). Jackstadt was convicted of marihuana possession and fined $25.00. *United States* v. *Lewis*, 392 F.2d 377, 379 (2d Cir. 1968), *cert. den.* 393 U.S. 891 (1968). But in most of the instances similar to the situation here, there is always more obtained from the surveillance and set forth in the affidavit than presented here. Usually, there is observance of activities around a place that support a fair inference that something illegal is going on inside, such as odors emanating from a building, or actual delivery of suspicious materials or substances into the building. *See United States* v. *Spinelli*, 393 U.S. p. 423, *supra*, White, J., concurring; *Lazarski & McDonald*, N.D.N.Y., 75-CR-166, 76-CR-15, decided April 29, 1976, *aff'd*, Second Circuit, Bench opinion,

January 6, 1977. The most we have here is several isolated factors that would only support, alone or in combination, good suspicion, but not probable cause.

Therefore, it is my conclusion from the above findings that probable cause was not sufficiently shown by the affidavit of Special Agent Fitzpatrick to support the issuance of the search warrant. The separate motions to suppress are granted, and the personal property seized shall not be offered in evidence by the prosecution.

It is so Ordered.

Dated: June 15, 1979
Albany, New York

s/ JAMES T. FOLEY

UNITED STATES DISTRICT JUDGE

APPENDIX C.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 617—September Term, 1979.

(Argued November 27, 1979

Decided February 14, 1980.)

Docket No. 79-1290

UNITED STATES OF AMERICA,

Appellant,

—v.—

KIRK M. JACKSTADT and JOSEPH A. TOURVILLE,

Appellees.

Before:

TIMBERS, VAN GRAAFEILAND, and NEWMAN,

Circuit Judges.

Appeal from an order of the United States District Court for the Northern District of New York, Foley, C.J., suppressing evidence seized pursuant to a search warrant on the grounds that the supporting affidavit fails to show probable cause.

Reversed.

TERRENCE M. KELLY, Assistant U.S. Attorney (George H. Lowe, U.S. Attorney for the Northern District of New York, of counsel), *for Appellant.*

ARA ASADOURIAN, Plattsburgh, NY (Neverett & Asadourian, Plattsburgh, NY, of counsel), *for Appellee Jackstadt.*

PAUL V. FRENCH, Albany, NY filed brief *for Appellee Tourville.*

PER CURIAM:

On January 18, 1979, United States Magistrate Henry C. Van Acker issued a search warrant for the residence of Joseph A. Tourville and Kirk M. Jackstadt in the Village of Ausable Forks, New York. Agents of the Drug Enforcement Administration and the New York State police executed the warrant that evening, seizing the components of a hashish oil factory, thirty pounds of hashish oil, and forty-nine pounds of marijuana. On February 20, 1979, a grand jury sitting in the United States District Court for the Northern District of New York indicted Jackstadt and Tourville for conspiracy to manufacture hashish oil and possess the drugs with intent to distribute (Count I), possession of hashish oil with intent to distribute (Count II), and possession of marijuana with intent to distribute (Count III). Tourville and Jackstadt then moved to suppress the items seized during the search, attacking the sufficiency of the affidavit used to secure the warrant.

The district court granted defendants' motions and the Government appeals. We reverse.

The affidavit in support of the search warrant is that of Special Agent Thomas M. Fitzpatrick of the Drug Enforcement Administration. It begins by recounting his past involvement in efforts to apprehend a group operating a hashish oil factory in the Plattsburgh, New York area. During the course of that investigation, Fitzpatrick participated in the arrests of Jackstadt and one Edward J. Desautels on May 6, 1978. A previously reliable informant had stated that Desautels was involved with the group manufacturing hashish oil. At the time of the arrests, which took place in Desautels' trailer in Plattsburgh, the police seized several pounds of marijuana, a quantity of hashish, and a small amount of hashish oil. Jackstadt pled guilty to a charge of possession of marijuana and was fined and released.

Charles J. Miller and William H. Reid, two principals in the manufacturing ring, were arrested, and the factory was seized on October 24, 1978. Tips from the previously reliable informant were partially responsible for these arrests. Among the items seized was an empty five-gallon can bearing the label of the Farrell Chemical Company, Winooski, Vermont. The can had contained petroleum ether, a solvent used to extract hashish oil from marijuana.

In December 1978, information from the previously reliable informant indicated that a hashish oil factory was once again operating at a "secluded rural location" in the area. Agent Fitzpatrick contacted the Farrell Chemical Company and was informed that one "Richard Miller" had ordered twenty gallons of petroleum ether on December 12, 1978. The ether was picked up

by a man using the name "Rick Miller" but driving a car registered to Joseph A. Tourville. On January 16, 1979, one "Rick Miller" ordered twenty gallons of petroleum ether from the Anachemia Chemical Company of Champlain, New York. On January 17, Jackstadt picked up the ether in his Jeep. He signed the receipt "R. Miller".

The police followed the Jeep to the Tourville-Jackstadt residence in Ausable Forks. About twenty minutes later, the police observed Jackstadt removing a five-gallon can from the Jeep. Shortly after that, Tourville's car, which had transported the petroleum ether from the Farrell Chemical Company, was also observed to be parked in the driveway.

The Magistrate was satisfied from the above facts that there was probable cause to believe that an illicit laboratory manufacturing hashish oil was being concealed at the Tourville-Jackstadt residence, and that finding is entitled to substantial deference. *Aguilar v. Texas,* 378 U.S. 108, 111 (1964); *United States v. Rahn,* 511 F. 2d 290, 292 (10th Cir.), *cert. denied,* 423 U.S. 825 (1975). A magistrate's finding of probable cause is itself a substantial factor tending to uphold the validity of the warrant. *United States v. Ramirez,* 279 F. 2d 712, 716 (2d Cir.), *cert. denied,* 364 U.S. 850 (1960); *United States v. Freeman,* 358 F. 2d 459, 462 (2d Cir.), *cert. denied,* 385 U.S. 882 (1969). In order to encourage the use of warrants, supporting affidavits should be read "in a commonsense and realistic fashion", *United States v. Ventresca,* 380 U.S. 102, 108 (1965), and in a close case any doubts should be resolved in favor of upholding the warrant, *id.* at 106. *Accord, United States v. Lewis,* 392 F. 2d 377, 379 (2d Cir.), *cert. denied,* 393 U.S. 891 (1968).

The affidavit in this case revealed large purchases of petroleum ether by the defendants using false names. One of them had previously been arrested on marijuana charges in circumstances that linked him to the manufacture of hashish oil. These were important factors tending to show probable cause. *See United States v. Lewis, supra,* 392 F. 2d at 379; *United States v. Park,* 531 F. 2d 754, 759 (5th Cir. 1976). The petroleum ether trail led directly to the defendants' residence. The transporting automobiles were parked there. Jackstadt had been followed there directly from the Anachemia Chemical Company. He was observed removing a five-gallon can from the rear of his Jeep. We do not find Agent Fitzpatrick's affidavit to be fatally defective because it fails to state explicitly that Jackstadt carried the container into the house. The Magistrate was entitled to make reasonable inferences from the facts stated in the affidavit. *United States v. Pond,* 523 F. 2d 210, 213 (2d Cir. 1975), *cert. denied,* 423 U.S. 1058 (1976); *United States v. Serao,* 367 F. 2d 347, 349-50 (2d Cir. 1966), *vacated on other grounds, sub nom. Piccioli v. United States,* 390 U.S. 202 (1968). It would be surprising indeed if Jackstadt had purchased petroleum ether, driven it to his home, removed a five-gallon can from his car and then strolled with it down the street. The inference that Jackstadt carried the ether into the house was plainly a reasonable one in the circumstances of this case.

Appellees' argument that those portions of the supporting affidavit referring to information supplied by an informant should be stricken, because they do not reveal the source of the information as required by *Aguilar v. Texas, supra,* 378 U.S. at 114, is not a compelling one in the context of this case. Most of the

informant's information had to do with the earlier investigation; the balance did no more than stir Agent Fitzpatrick into renewed activity. Information that Miller and his associates were supposed to be manufacturing hashish again "at a secluded rural location" had little relevance to the search of defendants' house in the Village of Ausable Forks. Without any reference to the informant's tip, cf. *Parts Mfg. Corp. v. Lynch,* 129 F.2d 841 (2d Cir. 1942), the officers' investigation and observation provided substantial basis for the Magistrate to conclude that hashish oil was probably being made in defendants' house. That is all the law required. *See United States v. Burke,* 517 F.2d 377, 381 (2d Cir. 1975). The suppression order is reversed.

Court of Appeals
for the
Second Circuit
APPENDIX D.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of October one thousand nine hundred and eighty.

Present:

HONORABLE IRVING R. KAUFMAN
HONORABLE AMALYA L. KEARSE
HONORABLE MYRON H. BRIGHT,
sitting by designation,
Circuit Judges,

UNITED STATES OF AMERICA,
Appellee,

v.

KIRK M. JACKSTADT and JOSEPH A. TOURVILLE,
Appellants.

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

The only issue before us on appeal -- where Agent Fitzgerald's affidavit was sufficient to support a finding of probable cause and the issuance of a search warrant -- was previously addressed by this court. United States v. Jackstadt, 617 F.2d 12 (2d Cir. 1980) (per curiam), cert. denied, 100 S.Ct. 1656 (April 14, 1980). This prior ruling is the law of the case. Rodman v. Comm'r of Int. Revenue, 548 F.2d 1109, 1111 (2d Cir. 1977); United States v. Fernandez, 506 F.2d 1200, 1203-4 (2d Cir. 1974). Since no new facts concerning the circumstances surrounding the issuance of the warrant have been unearthed or presented following our earlier decision, a departure from our prior ruling is not appropriate. Fernandez, supra. Accordingly, Judge Munson's judgment of conviction of June 27, 1980 is affirmed.

IRVING R. KAUFMAN
AMALYA L. KEARSE
MYRON H. BRIGHT,
Circuit Judges.

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